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IN THE

Supreme Court of the United States

October Term, 1952. No. 60.

THE PENNSYLVANIA RAILROAD COMPANY,
Petitioner,

vs.

CHARLES E. O'ROURKE,
Respondent.

ON PETITION FOR REHEARING.

PETITION AND BRIEF, AMICI CURIAE, OF ORDER OF RAILWAY CONDUCTORS, PENNSYLVANIA RAILROAD LINES EAST; BROTHERHOOD OF LOCOMOTIVE ENGINEERS, HUDSON & MANHATTAN RAILROAD COMPANY; BROTHERHOOD OF LOCOMOTIVE ENGINEERS, READING COMPANY.

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To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The above named labor unions beg leave to intervene and file a brief, amici curiae, because of the immense importance of the issue involved.

The Jones Act, 46 U. S. C. A. 688, *Federal Employers' Liability Act*, 45 U. S. C. A. 51, *The Longshoremen's and Harbor Workers' Compensation Act*, 33 U. S. C. A. 901, and the several state workmen's compensation acts were all written to help and protect employees. They are the legislative expression of the need for protection for work sustained disabilities in industry.

They were not written to help or aid or protect employers.

Progressively the protection by amendments has been extended, increased and broadened to meet the challenge of judge conceived restrictions and limitations produced by conceptualistic and narrowed reasoning and technical legalisms.

We must assume that Congress is always aware of these decisions and the resultant effect of these decisions as they affect the protection with which Congress sought to envelop employees in interstate commerce.

As the significance of each new decision in the several courts as well as in this court became apparent, applause or a hue and cry emanated from the group of employees favorably or adversely affected.

The Federal Employers' Liability Act as written in 1908 left much to be desired. Social consciousness had not then yet progressed far enough from the laissez-faire doctrine of economics of the preceding period to induce that Congress to eliminate assumption of risk as a defense. Nor had that Congress the foresight to envision the cunning and ingenuity with which counsel representing the carriers

would successfully twist that defense so that many seriously injured railroad employees would fail to be protected for these work-sustained injuries.

As the Federal Employers' Liability Act was then written, and as its tortured, twisted and maimed body then rested, little wonder exists that when in 1927 Congress sought a statute to provide protection for another totally separate and distinguishable group of men—Harborworkers and Longshoremen—that Congress did not place those men under the same weak and leaky protective coverage as the emasculated Federal Employers' Liability Act had as of that date become.

As of 1927, the coverage of the several state workmen's compensation acts had proven far superior to the Federal Employers' Liability Act. Hence, little surprise should be evinced because Congress wrote a compensation act for those harborworkers and longshoremen rather than Federal Employers' Liability Act type of coverage.

And it is with no surprise that the fighting liberals who sat on this bench when *Nogueira vs. N. Y. N. H. & H. R. Co.*, 281 U. S. 128, was decided, extended themselves to help longshoremen employed by railroad companies, by putting them under the assured recovery provided by the Longshoremen's and Harbor Workers' Compensation Act, rather than expose them to the then existing vicissitudes of the Federal Employers' Liability Act. They there placed railroad-employed longshoremen under the Longshoremen's and Harbor Workers' Compensation Act. This Court had held that longshoremen injured on vessels were not under local state compensation laws. *S. P. Co. vs. Jensen*, 244 U. S. 205.

By 1939, a warm and genial atmosphere of understanding and friendliness existed in Congress toward labor. The unfortunate state into which railroad-injury coverage had fallen then came into sharp focus. Too many leaks had made a sieve of the Federal Employers' Liability Act.

Congress was interested in remedying that whole picture. It wanted to give relief from such decisions of this Court as *Toledo, St. L. & W. R. vs. Allen*, 276 U. S. 165, and *Missouri P. & C. R. Co. vs. Aeby*, 275 U. S. 426, and the innumerable cases that had applied the pinpoint test to railroad employees in determining whether they were in interstate commerce or intrastate commerce and the back shop rule.

Every defect in the act was up for consideration and correction. Congress intended to provide adequate and similar protection for operating and non-operating employees. The statute was to be revised in every necessary aspect. As of 1939, the proclaimed value of state workmen's compensation acts had been demonstrated as false. The protection afforded had proven miserly and inadequate. The claimed certainty and speed of determination of claims under those statutes had been proven untrue. Men who lost legs or arms were being paid two or three thousand dollars and left to shift for themselves as industrial derelicts and undesirables. At the best, benevolent paternalism occasionally provided some make-shift job with no certainty of tenure or pay.

Seamen who had vigorously and successfully rejected and avoided inclusion within the Longshoremen's and Harbor Workers' Compensation Act had demonstrated their wisdom in so doing. The benefits of the *Jones Act*, 46 U. S. C. A. 688, plus the doctrine of seaworthiness, plus maintenance and cure had made them the best protected group of labor in the United States in industrial accident matters.

The English experience with their compensation acts had proven that compensations acts benefits were illusory and inadequate and just as dilatory in fruition. Today, England provides both. It has assured compensation, plus additional remedies on proof of negligence. *Halsbury's Laws of England*, Sec. 1318, 2d ed. 1940.

Hence, organized railroad labor did not permit itself in

1939 to be subjected to a compensation act in place of the Federal Employers' Liability Act. All that was needed was to amend and correct the evils so clearly, that for all times, no amount of ingenuity could induce the most restrictive judicial minds again to delimit the intended protection of the statute.

We of organized railroad labor of course knew all about *Nogueira vs. R. R.*, supra, and the deteriorating extent to which that case had been stretched in *Buren vs. S. P. Co.*, 50 F. 2d 407. We did not intend to lose an important segment of our membership, i. e. those railroaders who worked the tracks leading to and on floats, docks and wharves, if we could prevent it. We did not intend to permit legislative discrimination against that group in accident protection. They were and are part of us. One day they are on land, another on docks, wharves and floats and some of the time on both. Their work—that is the nature of their duties—is identical with the land stationed railroader. They, too, are land stationed railroaders. An incidence of the day's work takes one of the crew of five momentarily onto a float. As the record in *Zientek vs. Reading*, 93 F. S. 875, indicates, these men spend ninety-five per cent of their time on land. Four of the train crew of five men are on terra firma at the very instant that the other brakeman is on the float sustaining injury. Between the locomotive and the car on which the hind brakeman rides on to the float are the 'drifter' cars. They are empties which serve no purpose other than to provide adequate length to the train so that the end car can be pushed up to the end of the float track without the need of pushing the heavy locomotive onto the float too and possibly sinking or capsizing the whole works. Such fortuitous circumstance as which one of the two brakemen will act as hind man on that particular day makes one a longshoreman under this decision, and the other four men remain railroaders. How arbitrary and capricious can the law get? How unfair? The men are all one "crew",

one "team". Suddenly, they are four railroaders and one stevedore. Suppose out of ten cars, four were to put on a float. A brakeman gets on each end of the draft. Then the engine can approach the draft, to couple from either end. Dependent upon the end he fortuitously couples to, one brakeman remains a brakeman, the other presto! becomes a stevedore. Silly, isn't it? They throw switches, put on or release brakes, pass the same signals, operate under the same book of rules and are provided with the same benefits under the Railroad Retirement laws and the Railroad Labor Act, pay the same union dues and enjoy the same seniority privileges.

Hence, any such artificial wedge in our midst is as a hatchet in our skulls.

So, to be sure that all, including this bench would understand that we were taking all our brethren home with us, under the same roof and breaking the same bread, when the Act was microscopically examined before an enlightened and co-operative Congress in 1939, with the *Nogueira* case, supra, in mind, we successfully insisted that the words "boats, wharves and docks" remain or be reinserted in the Statute so that all would know that those of us whose duties sometimes took us over or onto navigable waters, would be protected by the Federal Employers' Liability Act. We had confidence that all courts and this one in the end would now administer this statute so that brakemen would be treated all alike and would be given the utmost of protection. We frankly lobbied in 1939 to attain the same end obtained by maritime labor in 1920.

Congress and this Court since Tiller vs. Atlantic Coast Line R. R. Co., in 318 U. S. 54, and the long line of cases that have since followed culminating with that masterful resume of Justice Douglas in Wilkerson vs. McCarthy, 336 U. S. 53, has indeed given railroaders the most complete and satisfactory protection they could ask.

As here and there a court below has deviated and per-

mitted the ugly defeatist head of assumption of risk or other squalid defenses to be raised by legerdemain reasoning, this Court has granted certiorari and vigorously and in no uncertain language reversed.

Certain grant of certiorari to employees in these cases is as vital to the protection of the employees as constant weeding is to the farmer or gardener. And those who complain thereof speaking in the lofty tones of the function of the Court, lose sight of the fact that in no field of law is there such rabbit like growth, of malignant theory determined to undermine congressional action as in work-sustained injury litigation. This Court has a duty of relentless supervision of this litigation, because of the unrelenting attacks on it on any basis from every conceivable angle or approach—too frequently in the false cloak of "benevolent understanding" or in the interest of the "welfare of the Court."

Hence, taking all things in their proper *chronological* order, the *last* word of Congress is to the effect that railroad employees including those whose work takes them occasionally on "boats, wharves or docks" are covered by the Federal Employers' Liability Act or the Jones Act.

To hold otherwise is to assume that the Congress which completely overhauled and rewrote the entire Federal Employers' Liability Act was ignorant, redundant and engaged in supercilious and meaningless legislating.

Else, when can an accident on a "boat" be within the Federal Employers' Liability Act or the Jones Act if the present decision in the instant case is to stand? All boats are on navigable waters. That is why they are boats—so that they may transport men, material and cars over the waters.

This Court may not so interpret the statute as to make the words "wharves, boats and docks" mere surplusage or oversight. Every word must have a meaning. If *Nogueira* was to have the twisted effect which some lower courts gave it and if Congress intended such to become the law of the land, then those words would not have been reinserted

in the *last* legislative directive in this field. *The words would have been deleted.*

This Court in its opinion today says: "Seamen preferred to take the risks of the Jones Act". That statute was bodily lifted from the Federal Employers' Liability Act to apply to seamen. We, too, thought we had expressed our preference likewise. What have seamen done that makes their position different from railroaders?

Even when this Court had before it the question whether a harborworker on a vessel came under the maritime law or the Longshoremen's and Harbor Workers' Compensation Act, in *Seas Shipping Co. Inc. vs. Sieracki*, 328 U. S. 85, it applied the test of "What is the nature of the work". As the court said in *Sieracki*, on page 99:

> "For these purposes he (longshoreman) is, in short, a seaman because he is doing a seaman's work and incurring seamen's hazards."

The court considered the effect of the *Longshoremen's and Harbor Workers' Compensation Act*, 33 U. S. C. A. 901, and held in that case that the obligation of the owner of the vessel was not nullified by that Statute. The court said at page 101:

> "In other words, it is claimed that the remedies afforded by the Longshoremen's legislation are exclusive of all other remedies for injuries incurred aboard ship, whether against the employer or others. *This view cannot be accepted.*" (Italics supplied.)

Inter alia, the court at page 96, also said:

> "Historically the work of loading and unloading is the work of the ship's service, performed until recently by members of the ship's crew. * * * That the owner seeks to have it done with the advantages of more mod-

ern divisions of labor does not minimize the worker's hazard and should not nullify his protection."

This court held the maritime duty of "seaworthiness" applied even to one who might otherwise have been classified as a longshoreman.

It was held there that a worker on a vessel, even a harborworker or a longshoreman, if doing a "seaman's" work when injured is entitled to the protection of the maritime law. It was directly held that the Longshoremen's and Harbor Workers' Compensation Act did not apply. It was a natural restatement of the law set forth in *International Stevedore Co. vs. Haverty*, 272 U. S. 50, where a stevedore was injured on a vessel, while doing seaman's normal duties; and it was held that he was entitled to the protection accorded to seamen.

In *Norton vs. Warner Co.*, 321 U. S. 565, Mr. Justice Douglas for an unanimous court held that a bargeman on a vessel having no motive power or steering force was nonetheless a "seaman" and entitled to the benefits of the Jones Act and that the Longshoremen's and Harbor Workers' Compensation Act did not apply to him.

The Court in that case recognized the superior advantages of the Jones Act over the Longshoremen's and Harbor Workers' Compensation Act. What has now changed that view? How is O'Rourke any less a seaman than Haverty or Rusin in *Norton vs. Warner*, supra, or Sieracki?

In *S. Chicago Coal & Dock Co. vs. Bassett*, 309 U. S. 251, this court likewise analyzed the "nature of the duty performed" in determining whether the liability of the employer was under the Jones Act or the Longshoremen's and Harbor Workers' Compensation Act. There, despite its holding in the *Haverty* case, supra, this court held that a Hohfeldian functional approach must be followed in interpreting the word "crew". Thus despite the holding in Haverty that one who "Loads and unloads" a vessel is none-

theless a "seaman" yet since his duties had naught to do with navigtation, in *Chicago Coal vs. Bassett* he was held not a "seaman" in determining the applicability of the Longshoremen's and Harbor Workers' Compensation Act. Yet, when Sieracki, supra, later came before the Court, in determining whether the employer of a longshoreman owed a duty of providing a "seaworthy" ship to him, this court held Sieracki, the longshoreman, to be again a "seaman" and entitled to such protection. Thus even though Sieracki, under the *Chicago Coal vs. Bassett* case could not have recovered under the Jones Act, since for that statute he was a longshoreman, and hence the Longshoremen's and Harbor Workers' Compensation Act had exclusive application, yet it held that Sieracki had a remedy providing absolute liability under "seaworthiness", as to which, like a chameleon, he had become again, a seaman.

Since, in the instant case, O'Rourke too claimed the protection of the Safety Appliance laws pertaining to brakes which provide absolute liability, on proof of causative violation, even unto non-employees such as the public and others (see *Fairport, P. & E. R. Co. vs. Meredith*, 292 U. S. 589), why did not this Court hold that O'Rourke was still properly before the U. S. District Court and jury on the issue of Safety Appliance Violations, even if the Federal Employers' Liability Act and Jones Act do not apply to him. Certainly the tracks on the float connecting up to the tracks of the carrier on the waterfront are part of its "lines". If a right of action exists to recover for a violation of the absolute duty that flows from "seaworthiness" even in the absence of the right to sue for negligence under the Jones Act, why, analogously, does not the same right exist for railroaders (O'Rourke) to recover for violation of the absolute duty created by the Safety Appliance Statutes, independently of whether there is a right to maintaining an action for negligence under the Federal Employers' Liability Act or Jones Act under the facts of this case?

As we can see, the United States Supreme Court has made a distinction between those who load and unload vessels, from those who are members of the crew and its functions and with those who bring a freight car on to the vessel for just a moment and are thereafter not to be considered as loaders and unloaders, but are in a class distinct and separate and easily discernible from those for whom this act was written and those whom it was intended to benefit.

At the time of the passage of the Longshoremen's and Harbor Workers' Compensation Act, in referring to the bill as it was ultimately concluded, Mr. Cummings, Chairman of the Senate Judiciary Committee, stated:

> "Section (3) of the bill described the persons to be brought within its terms with such exceptions as are necessary to limit the operation of the bill to such persons who are intended to be covered by it."

Referring to the preamble to discover who those persons may be, we find:

> "The purpose of the bill is to provide for compensation in the stead of liability for a class of employees known as 'longshoremen'. These men are *mainly* employed in loading, unloading, refitting and repairing ships * * * Longshoremen cannot avail themselves of the benefit of state laws because of the nature of their employment * * *. It thus appears that there is no way of giving to these hard-working men engaged in a somewhat hazardous employment the justice involved in the modern principle of compensation without enacting a uniform compensation statute." (Emphasis ours.) (Sen. Rep. 973, 69th Congress, First Session.)

From these words the implication arises that since railroad workers *did* have a recourse in the event that they

were injured, this Longshoremen's & Harbor Workers' Act would not have applied to railroad workers.

What the Congress was trying to do was provide compensation for a class of employees who had none previous to that time. Railroad workers were already covered by the Federal Employers' Liability Act. Therefore, it could not have been intended to include them in this Act.

Likewise, more recently in *Norton vs. Warner Co.*, 321 U. S. 565; 64 S. Ct. 747 (1944), quoting the same report by Mr. Cummings, the United States Supreme Court emphasized the same distinction between longshoremen, harbor workers and stevedores and seamen. It is clear that the plaintiff in our case was neither a longshoreman nor a harborworker within the purview of the Longshoremen's & Harbor Workers' Compensation Act.

The quotation just recited from the original report and from the *Norton* case, supra, was followed by the 3rd circuit in *Tucker vs. Branham*, 151 F. (2d) 96 (C. C. A. 3rd, 1945). In that case, Dillon was held to be a member of the crew even though among his duties it was conceded that, inter alia, "he had some duties with respect to loading and unloading of the vessel".

Indeed, the United States Supreme Court in *Sultan Railway Co. vs. Dept. of Labor*, 277 U. S. 135; 48 S. Ct. 505 (1928), said at page 137:

> "It is settled by our decisions that where the employment, although maritime in character, pertains to local matters having only an incidental relation to navigation and commerce, the rights, obligations and liabilities of the parties, as between themselves, may be regulated by local rules which do not work material prejudice to the characteristic features of the general maritime law or interfere with its uniformity."

Moreover, in *Davis vs. Dept. of Labor*, 317 U. S. 249, at 256; 63 S. Ct. 225 (1942); the court stated:

"There is, in the light of the cases referred to, clearly a twilight zone in which the employees must have their rights determined case by case, and in which particular facts and circumstances are vital elements. That zone includes persons such as the decedent who are, as a matter of actual administration, in fact protected under the State Compensation Act."

In that case, a structural steel worker was drowned in a navigable river and the lower court had rejected a claim filed under the Workmen's Compensation Law of the State with a view that the remedy was exclusively under the Harbor Workers' Act. A reading of the opinion of the United States Supreme Court reveals that the Workmen's Compensation Law of the state applied exclusively despite the accident on navigable waters.

In *Central Engineering Co., et al. vs. Bassett*, 42 F. Supp. (D. C. S. D. Ill. 1941) it was held that an engineering company's employee who was injured on a vessel in navigable waters was not engaged in maritime work and therefore not covered by the Harbor Workers' Act.

In the *Davis* case, supra, the United States Supreme court spoke of a "twilight zone" in which employees had their rights determined case by case and final determination was upon the circumstances of each. Since then, in *Moore's Case*, 80 N. E. (2d) 478, Chief Justice Qua of the Supreme Judicial Court of Massachusetts stated:

*"We are inclined to include within the twilight zone the case of a workman engaged in the ordinary land occupation although occasionally going on a dry dock or vessel to make repairs * * *"* (Emphasis supplied.)

He further states that the Massachusetts Court regarded the *Davis* case as a

"* * * revolutionary decision, deemed necessary to escape an intolerable situation as designed to include

within a wide circle of doubt all water front cases involving aspects pertaining both to the land and to the sea where a reasonable argument can be made either way, even though a careful examination of numerous previous decisions might disclose an apparent weight of authority one way or the other. We can see no other manner in which the Davis case can be given the effect that we must suppose the court intended it should have, and we must assume that the court intends to follow that case in the future.".

In the *Bassett* case, supra, this court in interpreting this statute stated, at page 260, the test as follows: "The question (crew) concerns his actual duties". Why, then, did this court in the instant case in determining which statute applied not limit itself to that test? Why, for the first time, did it now state the test to be, "Is this an accident on navigable waters sustained by one in the employ of an employer who has any employee engaged in maritime service"?

If one follows the clear course of the previously decided cases, this decision is today erroneous. Only by shifting the emphasis to the sometimes maritime character of the master's service can the present result be reached.

If the nature of the employers business is to be considered as the test, then this employer is at least in the maritime business, if not in the railroad business. Certainly the railroad is not in the stevedoring or longshoreman's business.

At least O'Rourke is under the Jones Act, 46 U. S. C. A. 688 *if not under the Federal Employers' Liability Act*, 45 U. S. C. A. 51. No stipulation of counsel can change that! This Court cannot be stultified by stipulations of law, erroneously ignoring a jurisdictional federal statute.

Under no stretch of the imagination can O'Rourke be made out a longshoreman.

The majority opinion in the case at hand, in the closing paragraphs reviewed a series of cases of non-maritime em-

ployment in which it had been held the employee was covered by the Longshoremen's and Harbor Workers' Compensation Act. In all of those cases the court had to place the employee either under the Longshoremen's and Harbor Workers' Compensation Act or a local Workmen's Compensation Act. They did not present a decision between the several federal statutes. Because some of the employees worked and the particular accident occurred on the navigable waters of the United States it naturally was held in those cases that the federal legislation had supersedence. That was because Congress had legislated in that field of interstate commerce. But as between three federal statutes where the employer has some of its functions performed in the maritime field and over the navigable waters of the United States, it is nonetheless ridiculous to hold that in *every* accident which occurs over navigable waters, that, per se, it is the Longshoremen's and Harbor Workers' Compensation Act that applies. *Rather, once the locus of the accident is shown to have been over navigable waters, then the character of the employee's general work is the determinant.* Let us take the employer in question. The Pennsylvania Railroad Company has some employees whose work is entirely on land, others entirely on navigable waters and some on both. The maritime aspect is by far the smallest part of its business. Does this make the Pennsylvania Railroad a longshore or stevedoring company? Does this make its railroaders longshoremen? Does this make its employees who ride its floats across the rivers of the United States harborworkers rather than seamen or railroaders? Is not the test, "what is the general nature of the particular employee's every day work?" Did not Congress give us the answer by the Amendment of 1939 (the last statement of Congress) in which it said that the general character of the employee's work is to be considered, not what he was doing at the instant of the accident? Are these railroaders to be deprived of the intended coverage of the Federal Employers'

Liability Act and the Jones Act because of a misunderstanding of the position of the Longshoremen's and Harbor Workers' Compensation Act in the federal master and servant relationship within the several federal laws intended to cover each according to his labor?

All that Congress has done is this. Railroaders and seamen in interstate commerce had been covered by the Federal Employers' Liability Act and Jones Act. Others, such as longshoremen and harbor workers on the navigable waters of the United States were placed under federal supervision by other legislation specially written for them so as to provide uniformity of protection for *that* group throughout the United States. Each class of employment to its own statute. Nowhere and never did Congress intend the Longshoremen's and Harbor Workers' Compensation Act to encroach on the other already covered and protected groups,—the railroader and seamen. Only because *Nogueira* was a *longshoreman* on navigable waters did this Court extend the coverage of the Longshoremen's and Harbor Workers' Compensation Act to him rather than leave him to the New York Workmen's Compensation Act. That case merely holds that when Congress in a field in which it has supremacy, had spoken, then the federal remedy became exclusive. That case occurred before the Amendment of 1939 to the Federal Employers' Liability Act that removed the pinpoint test of interstate commerce. Hence, since *Nogueira* was either to be paid under New York Workmen's Compensation Act or the Harborworkers and Longshoremen's Act. Since Congress had legislated as to harborworkers, and that employee was then doing typical longshoreman's work, the New York Statute did not apply and the federal statute did.

From that case limited to its own facts, all too willing courts proceeded to extend the Longshoremen's and Harbor Workers' Compensation Act to employments already covered by the Federal Employers' Liability Act and the Jones Act. Unfounded rulings like *Buren vs. S. P. Co.*, 50 F. 2d

407, proliferated the Federal Employers' Liability Act. The mere locus of the accident over water, was there unwarrantedly held to change a railroader into a longshoreman. At the most, he might have become a seaman.

Judge Welsh in *Zientek vs. Reading Co.*, 93 F. S. 875, knocked the *Buren* decision into a cocked hat and literally demonstrated its unsoundness. The legislative history of the Federal Employers' Liability Act in 1939, should remove all doubt of the present state of the law and which federal statute should apply in each instance, dependent upon the nature of the labor being employed, plus its locus and whether regularly or minimally. As to a railroad brakeman, the locus can only enlarge the applicable statutes to a choice between the Federal Employers' Liability Act and the Jones Act.

The decision today of the Court in this case is, therefore, all the more puzzling. It is impossible in logic and reason to join in the opinion in *Sieracki*, to cite with approval the *Haverty* case, to write the opinion in *Norton vs. Warner*, supra, to express the liberal sentiments found in the opinion in *Bailey vs. Central Vt. Ry.*, 319 U. S. 350, and *Wilkerson vs. McCarthy*, 336 U. S. 53, and yet join in the majority opinion of the Court in the instant case. It taxes our minds and our hearts to understand how one today can write the dissenting opinion in *S. Buffalo R. Co. vs. Ahern* (1-19-53) and express such high humanitarian sentiments * for which we too vainly heretofore ourselves argued in this Court in our petition for leave to intervene, amici curiae pro petition for certiorari in *Heagney vs. Eastern District Terminal*, 190 F. 2d 976, 342 U. S. 920, and yet, on the same day, abandon the same hapless brakeman who by chance is the one man of the whole train crew who for a few plighted moments must ride the draft onto the float to set a brake and make the cut. Such is O'Rourke, and Zientek and Gussie and

* The plea for the adoption of the Brandeis view of the FELA coverage in **N. Y. C. R. R. v. Winfield**, 244 U. S. 147.

Job and the other brakemen who instante are metamorphosized into stevedores—and lose arms and legs and life itself and are compensated at $15.00 or $20.00 or $25.00 a week for several hundred weeks, and then literally starve and are forgotten. We do not hesitate for a moment to say that the case as argued and pleaded before the Court, failed to bring to the attention of the Court, the applicability of the Jones Act, if the locus of the accident over navigable waters has its touted significance at all.

The Longshoremen's and Harbor Workers' Compensation Act is one of bondage. It is cheap, inequitable and literally non-compensatory for the losses suffered. Written just after the First World War, it is an affront to intelligent and self respecting men in these times. Particularly is this so to men in such highly regarded employment as railroading. To reduce railroaders to that status and its concomitant chains and pressures, can be done and should be done only by Congress in clear, specific language. It should be done only by elected representatives of the people who must face the electorate to explain this demotion. It should not be done by judicial fiat.

If there are any among those who joined in this majority opinion who believe that railroaders in the petitioner's category are being helped by the alleged "assured and * * * prompt and certain recovery * * *" of the Longshoremen's and Harbor Workers' Compensation Act, let them be disillusioned of such thoughts.

There is no compensation statute in federal or state laws worth a tinker's dam. If the bleeding hearts which recently have given verbal vent in the American Bar Association articles and elsewhere to expressions of grief over the unfortunate lot of railroaders and seamen in not having a compensation act to provide for them in work sustained accidents, would only inform themselves of the actual facts, then those tears would cease and they would let well enough alone (if those tears are sincere).

An intelligent appraisal with a view toward helping railroad employees attain the maximum protection cannot be gained by reading and accepting the conclusions of the Railroad Retirement Board, Work Injuries in the Railroad Industry, 1938-40 (1947). For an up to date, scientific evaluation, see *Federal Employers' Liability Act—a Real compensatory Law for Railroad Workers*, by B. Nathaniel Richter and Lois G. Forer, Esqs., 36 Cornell L. Q. 203 (1952).

The statistics produced by the Railroad Retirement Board were predicated entirely upon cases which occurred before the Amendments of 1939 were enacted. Hence, there were so many cases lost. Today, more than 95% of all injured railroaders recover for their injuries at work. And the recoveries are so much greater and truly realistic, that the railroad companies now lobby for passage of a compensation act, to reduce that protection. Those who truly wish to improve the railroaders lot should familiarize themselves with the opinion of the late Mr. Justice Brandeis in *New York Central R. Co. vs. Winfield*, 244 U. S. 147, where he tried to have the court hold that railroad employees have both the protection of the local compensation act plus the right of additional recovery under the Federal Employers' Liability Act upon a showing of negligence. Thus would the railroad industry provide true protection for its men. We would then approximate what the English have universally accomplished in their industries without regard to inter or intrastate employment.

If we cannot have both—do not wrench from us what we have attained after so much effort and pleading and suffering.

Respectfully submitted,

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